in the

Supreme Court

of the

United States

OCTOBER TERM, 1978

NO. 78-1773

ETHEL BECKFORD, CYNTHIA LAWRENCE, HENRY LAWRENCE, DEVITA BRUTON, WILLY CLYDE STROUD, JOHNNY FLETCHER, GERALDINE FLETCHER, LEE BOHLER, SARA LAWRENCE, LEE ARTHER LAWRENCE, ANNIE MAY LABORN, MADELYN SCHERE, LESLIE ALAN SCHERE, JOHN CUNNING, CAROL CUNNING, THOMAS RUSSELL, LAURIE RUSSELL, DOUGLAS KNOWLES, EDYTH KNOWLES, WAYNE LOUGH and PATRICIA LOUGH,

Petitioners,

vs.

DADE COUNTY SCHOOL BOARD

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ARGUMENT

REASONS FOR DENYING THE WRIT

1. Introduction

The public school system of Dade County, Florida, the fifth largest in the nation, was desegregated as the result of judicial proceedings in 1969-1970, and held to be unitary in *Pate v. Dade County School Board*, 434 F.2d 1151 (5th Cir. 1970), *cert. denied* 402 U.S. 953, 91 S.Ct. 1613, 29 L.Ed.2d 123 (1971). In its opinion, the Fifth Circuit concluded by placing the School Board and the district court under the continuing duty to appraise the system and to make changes as might be required to assure the maintenance of a unitary system.

Unlike many other local school systems subject to desegregation mandates, the Dade County School Board has in the ensuing years demonstrated its commitment to the unitary system and its compliance with constitutional requirements. In doing so, it has voluntarily acted to improve the system, and survived challenge by disaffected parents claiming the Board went too far in the direction of desegregation. *See Darville v. Dade County School Board*, 497 F.2d 1002 (5th Cir. 1974). On the other hand, the Board has also twice successfully resisted attack from complainants at the other end of the political spectrum, who sought to contest the unitary status of the school system. *See Pate v. Dade County School Board*, 509 F.2d 806 (5th Cir. 1975).

The common thread to this history, which recurs in the present case, is the firm desire of the School Board to follow the law, but in doing so to make its own decisions

and exercise its own governance in the best interests of the school system, without bowing to extraneous pressures by groups with special interests. The present dispute, arising out of a Board decision to pair only two elementary schools, is another example of an attempt by a parent group to transform a policy disagreement into a justiciable issue.

Underlying all the rhetoric presented by the parents concerning their desire to "free the School Board from judicial restraint so that it may exercise its discretion" are two simple realities which belie their arguments. In the first place, it is obvious that this parent group is simply registering dissatisfaction and disagreement with the School Board's discretionary decision to comply with the district court's order requiring attendance adjustments for the two elementary schools. If the parents were the School Board, they would have decided to appeal that order. The Board, however, is elected by the citizens of all of Dade County, and has the responsibility, which it exercised in this case, to look beyond the self-interests of these parents, no matter how intense or well-meaning their convictions.

Secondly, it is clear that the decision of the School Board to pair the two schools was an exercise of the very discretion which the parent group perceives as being impaired. In reality, therefore, what is in issue here is the School Board's authority to take voluntary action in the direction of further desegregation within its unitary system. Since the decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), it has been undisputed that school boards have full power to determine student attendance patterns in furtherance of desegregation —

even to the point of prescribing racial ratios in schools — and nowhere in the petition is this contested.

In the present case, concededly, the Board took its action pairing Pine Lake and Richmond Elementary Schools in compliance with the district court's order. The conclusive point however, is that in this instance, as in *Darville, supra*, the Board voluntarily acted, in its discretion, to adopt student assignments calculated to improve the quality of desegregation within the school system. If the Board could have done so in the first instance in the exercise of its broad discretionary power, surely the Board has no less power to do so in voluntary compliance with an order of the district court.

This simple issue, it seems to us, is the axis of the present controversy, and demonstrates the insubstantiality of the petitioners' position.

2. Argument to Point I

THE DECISION BELOW, ON THE FACTS OF THIS CASE, PRESENTS NO DECISIONAL CONFLICT WITH OTHER COURTS OF APPEAL.

The issue here is a narrow one, despite petitioners' attempts to inflate it. In the district court, the proceedings involved only the propriety of the student attendance zone established by the School Board for a new elementary school, Pine Lake Elementary, in relation to the existing zone for an older nearby school, Richmond Elementary. The Board defended its actions, but after an adverse ruling decided to comply rather than appeal, and simply paired the two schools. Only then did the present petitioners seek to intervene, for the purpose of taking an appeal in the place of the Board. The issue tried to the district judge was a small one, the remedy prescribed by the judge was limited to the two schools, and the Board in its decision to comply was and is unaware of any judicial interference with its educational policies and goals for the children in the two schools. Accordingly, the Board objected to the late attempt at intervention by the dissatisfied parent group, which was denied by the district court and by the Court of Appeals.

Petitioners' prime reliance, in their attempt to show a conflict warranting review by this Court, is upon *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). It is true enough that the Fifth Circuit, in its decision below, declined to follow the *Smuck* case. It does not, however, follow that the decision below *conflicts* with *Smuck*,

which dealt with a singular and much different factual context. When the circumstances of the two cases are contrasted, the decisions are not inconsistent, and the ruling of the Fifth Circuit would have been the same even if it had followed the approach taken by the *Smuck* court.

A careful reading of the *Smuck* decision clearly reveals this. In the first place, the court there affirmed the trial judge's action *permitting* intervention for appeal purposes, and observed that even under Rule 24(a), his decision to permit intervention "of right" involved an exercise of discretion. *Smuck*, *supra*, at p. 178. Strictly read, then, the Court of Appeals in its decision simply held that the trial judge had not abused his discretion in allowing intervention, under the particular circumstances of that case.

When we examine those unusual circumstances, the bases for the decision appear, and the wide differences from the present case become clear. The decree entered by the trial court found a variety of constitutional violations of system-wide import in the District of Columbia school system, and required remedial plans and actions on a broad scale. The Court of Appeals noted that the appointed Board of Education which had decided not to appeal the decree had been superseded by a newly-elected Board, which had not had a choice on the appeal question, and which the Court observed should have the fullest discretion possible to reshape educational policy within the District. The new Board did not oppose intervention by the parents, which was thus allowed in order to permit them to appeal "those provisions of the decree which curtail the freedom of the school board to exercise its discretion in deciding upon educational policy."

In contrast, of course, the same Dade County School Board which participated in the litigation here then determined not to appeal the district court's order but to comply with it, and the same Board then implemented the pairing of the two schools.

On further examination of the *Smuck* decision, we see that the intervening parents were limited by the Court in the scope of their intervention, since ". . . their interest extends only to those parts of the order which can fairly be said to impose restraints upon the Board of Education." *Smuck*, *supra* at p. 182. The Court made quite clear that not every order of the trial court was "restraint" which the parents-intervenors could contest, but only such portions of the decree which limited the Board's discretion to pursue *educational goals*. Indeed, the Court held that the district court's rulings requiring a long-range pupil assignment plan, and abolishing a "track system" of pupil grouping, did *not* limit the Board's discretion educationally, and that the parents therefore lacked standing to challenge the bases for these rulings. *Smuck*, *supra*, pp. 186-190.

In contrast again, the district judge in the present case only required an adjustment of zones with respect to two elementary schools. This can hardly be seen as any significant "restraint" upon the School Board, and it has no effect whatever on the Board's discretion to pursue educational goals and policies.

The *Smuck* decision, therefore, is much narrower than petitioners suggest, and does not by any means present a conflict with the Fifth Circuit's ruling on the facts of this case.

The other decisions cited by petitioners in their attempt to show a conflict among the circuits may be dealt with quickly. With one exception discussed below, none of the cases decided by Courts of Appeal were concerned with the present issue — intervention to gain standing to appeal. *Atkins v. State Board of Education*, 418 F.2d 874 (4th Cir. 1969) does not cite *Smuck* at all, and approves intervention by parents seeking to desegregate a school system, rather than to complain of an order promoting desegregation. *Liddell v. Caldwell*, 546 F.2d 768 (8th Cir. 1976) cites *Smuck* for the proposition that parents have standing to challenge a *segregated* school system, and approves intervention by black pupils in the trial court for the purpose of challenging the sufficiency of a desegregation decree. *United States v. Board of School Commissioners*, 466 F.2d 573 (7th Cir. 1972) cited *Smuck* only for the general statement that students and parents have an interest in a sound educational system, and *denied* intervention of right to a citizen-parent group, while allowing the trial court, on remand, to consider permissive intervention by the same group in light of newly-raised issues of city-suburban school district consolidation. *Adams v. Mathews*, 536 F.2d 417 (D.C. Cir. 1976), had nothing to do with school law, and approved intervention, without objection by any party, solely to cure a mixup between two lower courts. *Johnson v. San Francisco Unified School District*, 500 F.2d 349 (9th Cir. 1974) merely allowed intervention in a desegregation case by Chinese parents who represented a distinct ethnic viewpoint.

The one case cited by petitioners which approved intervention for appellate purposes was a Title VII action, in which a putative class member was allowed to intervene in order to appeal a denial of class certification, where the original plaintiffs who purported to represent the class had declined to appeal. *See Romasanta v. United Airlines, Inc.*, 537 F.2d 915 (7th Cir. 1976). The case had nothing to do with school boards or desegregation, and cited *Smuck* only in passing, as did the Supreme Court in its affirmance of the ruling in *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977).

In sum, the petitioners have failed to demonstrate any significant conflict on a substantial point of law, such as to warrant review and resolution by this Court. The alleged conflict with the *Smuck* decision dissolves when analyzed because the special circumstances on which the *Smuck* court based its decision to permit intervention simply do not exist in this case.

This distinction was clearly observed in *Spangler v. Pasadena City Board of Education*, 427 F.2d 1352 (9th Cir. 1970), in which the Ninth Circuit decided the precise issue involved here. In affirming the district court's ruling denying leave to intervene to a parent group which sought to appeal from a desegregation decree, the Court said:

> In the case before us the decision not to appeal was in effect a decision to acquiesce in the court decree - a decision made by the very board affected by the decree. The decision was made by a board of elected representatives of the residents of the school district, including these applicants. It was made following public hearings at which appellants had full opportunity to influence the board's decision. That decision was within the competence of the

board in balancing many competing factors against the relatively modest degree of restraint imposed by the decree.

* * * * *

It is clear that the protectable interest of appellants in the freedom of their school board from excessive judicial interference is substantially less apparent here than it was in Smuck. Such restraints as were imposed have in substance been found acceptable by the Board and thus create no present prejudice.

Spangler, supra at 1354.

3. Argument to Point II

PETITIONERS' CHALLENGES TO THE MERITS OF THE DISTRICT COURT'S ORDER OF JUNE 16, 1978 HAVE NOT BEEN CONSIDERED BY THAT COURT OR THE COURT OF APPEALS, AND SHOULD NOT BE INITIALLY DECIDED BY THE SUPREME COURT.

In their argument on this Point, petitioners seek to have the Court reach and review the merits of the contentions petitioners *would* have submitted to the Court of Appeals, if their intervention had been granted. These issues, however, have never been considered by the district court at all, and although argued by petitioners in their brief to the Fifth Circuit, that court also very clearly did not pass on petitioners' contentions. As the Fifth Circuit observed in its opinion, the appellants (petitioners here) conceded that unless they were successful in establishing their right to intervene, they had no standing to appeal in respect to the district court's order of June 16, 1978, which the School Board had declined to appeal (Appendix to petition, pp. 19a-20a). The Court of Appeals thus *dismissed* the appeal taken by petitioners from that order.

In this posture of the case, we frankly do not feel called upon to argue these issues. We simply suggest that it would be highly inappropriate, and a departure from settled practice, for the Court at this point to decide issues which have been passed over by the courts below, and as to which the Court does not have the benefit of prior appellate scrutiny and deliberation. See Wright, Miller & Cooper, *Federal Practice and*

Procedure, vol. 17, sec. 4036 (1978); and cases cited in footnote 65 to that text.

While we believe that the Court should not review this case at all, we submit that if certiorari is granted, the writ should be limited to the question of the petitioners' right to intervene in order to pursue their appeal. Their substantive contentions should be considered only if the Court then rules favorably on their right to intervene, and these contentions should properly be remanded for prior consideration by the district court and the Court of Appeals.

CONCLUSION

The parents-appellants cast themselves in the role of defenders of the School Board's discretion, and see the Board as needing protection from the federal courts.

The School Board feels no present need for protection from the judiciary. It rather asks the Court for protection against the attempted usurpation of its decision-making authority by the parental group.

The petitioners have failed to show any significant decisional conflict among the circuits and their plea for intervention is patently nothing more than a policy disagreement with the School Board over a minor student assignment change.

The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been served upon all parties required to be served, service having been effected by mail, in accordance with paragraph 1 of Rule 33 of the Rules of the Supreme Court of the United States, to the following named attorney of record, on the_____day of July, 1979.

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